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No. 96-466

In the Supreme Court of the United States

OCTOBER TERM, 1996

KATHY STUPAK-THRALL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In Section 3(b) of the Michigan Wilderness Act of 1987 (MWA), Pub. L. No. 100-184, 101 Stat. 1274, Congress created the Sylvania Wilderness Area within the Ottawa National Forest. In accordance with that provision, the Forest Service amended its forest management plan for the Ottawa National Forest in 1992. The plan amendment, referred to as Amendment No. 1, contains the management prescriptions necessary to manage the Sylvania Wilderness Area as a wilderness, including management prescriptions for surface uses of lakes within the wilderness boundary. This case presents the following questions:

1. Whether Congress, pursuant to its authority under the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, may authorize the Forest Service to regulate private property interests within the boundaries of a wilderness area.

2. Whether Amendment No. 1 is inconsistent with MWA § 5, 101 Stat. 1275-1276, which provides that the Forest Service's administration of the Sylvania Wilderness Area is "[s]ubject to valid existing rights."

3. Whether Amendment No. 1 otherwise exceeds the scope of the Forest Service's statutory authority.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	10
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Camfield v. *United States*, 167 U.S. 518 (1897)	12
Duncan Energy Co. v. *United States Forest Service*, 50 F.3d 584 (8th Cir. 1995)	13
Free Enterprise Canoe Renters Ass'n v. *Watt*, 711 F.2d 852 (8th Cir. 1983)	13
Kleppe v. *New Mexico*, 426 U.S. 529 (1976)	13
Neil v. *Biggers*, 409 U.S. 188 (1972)	10
Thies v. *Howland*, 380 N.W.2d 463 (Mich. (1985)	3
United States v. *Alford*, 274 U.S. 264 (1927)	12
United States v. *Lindsey*, 595 F.2d 5 (9th Cir. 1979)	13

Constitution, statutes and regulation:

U.S. Const. Art. IV, § 3, Cl. 2 (Property Clause)	6, 7, 12, 13
Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743	4
§ 706(a), 90 Stat. 2793	4
§ 706(b), 90 Stat. 2794	4
Michigan Wilderness Act of 1987, Pub. L. No. 100-184, 101 Stat. 1274	2, 4, 8, 11, 12, 14
§ 3(b), 101 Stat. 1274	2, 5
§ 5, 101 Stat. 1275-1276	2, 5, 7, 9, 10, 11, 12
§ 7, 101 Stat. 1277	14, 15
§ 9, 101 Stat. 1277	15

Statutes and regulation—Continued: Page

National Forest Management Act, 16 U.S.C. 1600 *et seq.* 3
16 U.S.C. 1604 4
16 U.S.C. 1604(a) 4
Organic Act of 1897, ch. 2, § 1, 30 Stat. 35 3
Wilderness Act, 16 U.S.C. 1131 *et seq.* 4
§ 2(a), 16 U.S.C. 1131(a) 14
§ 2(c), 16 U.S.C. 1131(c) 4
§ 4(c), 16 U.S.C. 1133(c) 4
16 U.S.C. 551 3

Miscellaneous:

36 C.F.R. Pt. 219 4

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OPINIONS BELOW

The order of the en banc court of appeals affirming by an equally divided court the judgment of the district court (Pet. App. 1-2), and the opinions concurring in (Pet. App. 2-8) and dissenting from (Pet. App. 8-97) that order, are reported at 89 F.3d 1269. The opinion of the court of appeals panel (Pet. App. 100-123) is reported at 70 F.3d 881. The order of the en banc court of appeals vacating the panel decision (Pet. App. 98-99) is reported at 81 F.3d 651. The opinion of the district court (Pet. App. 124-140) is reported at 843 F. Supp. 327.

JURISDICTION

The order of the en banc court of appeals was originally issued June 24, 1996. That order was reissued, together with opinions concurring in and dissenting from the order, on July 23, 1996. Pet. App. 1-2 n.*. The petition for a writ of certiorari was filed September 24, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the Forest Service's management of a congressionally-created wilderness area in the Upper Peninsula of Michigan. In Section 3(b) of the Michigan Wilderness Act of 1987 (MWA), Pub. L. No. 100-184, 101 Stat. 1274, Congress created the Sylvania Wilderness Area within the Ottawa National Forest. Section 5 of the MWA provides, in relevant part, that "[s]ubject to valid existing rights, each wilderness area designated by this Act shall be administered by the Secretary of Agriculture in accordance with the provisions of the Wilderness Act of 1964 governing areas designated by that Act." 101 Stat. 1275-1276. In accordance with that provision, the Forest Service amended its forest management plan for the Ottawa National Forest in 1992. The plan amendment, referred to as Amendment No. 1, contains the management prescriptions necessary to manage the Sylvania Wilderness Area as a wilderness, including management prescriptions for surface uses of lakes within the wilderness boundary.

Petitioners are landowners whose property abuts Crooked Lake, a lake that lies mostly within the Sylvania Wilderness Area. Petitioners challenged Amendment No. 1 as violating their valid existing

riparian rights in Crooked Lake.[1] The district court upheld Amendment No. 1, Pet. App. 124-140, and a unanimous panel of the court of appeals affirmed, *id.* at 100-123. The court of appeals vacated the panel decision and granted rehearing en banc. *Id.* at 98-99. On rehearing en banc, the court of appeals divided equally and entered an order affirming the judgment of the district court. *Id.* at 1-2.

1. The Forest Service, an agency within the Department of Agriculture, manages the National Forest System. Under the Organic Act of 1897, ch. 2, § 1, 30 Stat. 35, creating the Forest Service, Congress directed the Secretary of Agriculture to

> make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside * * *; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction * * *.

16 U.S.C. 551.[2] The National Forest Management Act (NFMA), 16 U.S.C. 1600 *et seq.*, further directs

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[1] Property that abuts a lake is properly referred to as "littoral" property; the term "riparian" refers more properly to property that abuts a river. *Thies* v. *Howland*, 380 N.W.2d 463, 466 & n.2 (Mich. 1985). Because this case involves the application of Michigan law, however, we (like petitioners, see Pet. 5 n.3) will defer to the practice of that State's courts and will use the term "riparian" as a catch-all to refer to both riparian and littoral rights.

[2] That statute was repealed "insofar as [it] appl[ies] to the issuance of rights-of-way over, upon, under, and through public

the Forest Service to develop a land and resource management plan—also known as a forest management plan—for each unit of the National Forest System. 16 U.S.C. 1604(a). A forest management plan is prepared under the guidelines set forth in 16 U.S.C. 1604 and 36 C.F.R. Pt. 219.

The Forest Service is also charged with the management of wilderness areas pursuant to the Wilderness Act, 16 U.S.C. 1131 *et seq.* Section 2(c) of the Wilderness Act defines a "wilderness" as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." 16 U.S.C. 1131(c). Section 4(c) of the Wilderness Act provides:

> Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purposes of this chapter * * * there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

16 U.S.C. 1133(c).

In the MWA, Congress established the Sylvania Wilderness as one of ten new wilderness areas. See

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lands and lands in the National Forest System" by Section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2793. It was left in place "except as it pertains to rights-of-way" by Section 706(b) of the FLPMA, 90 Stat. 2794.

MWA § 3(b), 101 Stat. 1274. The MWA further provides that

> [s]ubject to valid existing rights, each wilderness area designated by this Act shall be administered by the Secretary of Agriculture in accordance with the provisions of the Wilderness Act of 1964 governing areas designated by that Act.

MWA § 5, 101 Stat. 1275-1276. The dispute between petitioners and the government in this case centers on the phrase "[s]ubject to valid existing rights."

To manage the Sylvania Wilderness, the Forest Service amended its forest management plan for the Ottawa National Forest in 1992. That amendment, known as Amendment No. 1, contains three management prescriptions at issue in this case. Amendment No. 1 prohibits the use of sail-powered watercraft anywhere within the wilderness area, Pet. App. 178; bars visitors from bringing "nonburnable disposable food and beverage containers" into the wilderness, *id.* at 179; and bans houseboats within the wilderness area, see *id.* at 125.

2. After exhausting her administrative remedies, petitioner Kathy Stupak-Thrall filed suit in federal district court to contest the validity of Amendment No. 1. Her suit was consolidated with a separate action filed by petitioners Michael A. and Bodil Gajewski.[3] On cross-motions for summary judgment,

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[3] The government moved to dismiss the Gajewskis' lawsuit on the ground that the Gajewskis had not exhausted their administrative remedies. The district court denied that motion. See Pet. App. 18. The district court then consolidated the two cases because they presented similar challenges to Amendment No. 1. *Ibid.*

the district court awarded partial summary judgment in the government's favor.[4] Pet. App. 124-140.

The district court agreed with petitioners that the phrase "valid existing rights" encompasses riparian rights. Pet. App. 130-131. The court observed, however, that "[u]nder Michigan law, local governments have the power to regulate riparian activities on lakes within their jurisdictions," pursuant to their authority "to protect the public health, safety, and general welfare of persons and property within their communities." *Id.* at 131. Pursuant to the Property Clause of the United States Constitution, Art. IV, § 3, Cl. 2, the court concluded, Congress had authorized the Forest Service to protect the federal government's interest in Crooked Lake[5] by establishing restrictions on private use of the lake. Pet. App. 132.

The district court also held that the restrictions established by Amendment No. 1 are permitted under the "reasonable use" doctrine of Michigan riparian law. Pet. App. 136-140. Under that doctrine, a riparian owner enjoys a right to use the surface of an adjoining lake provided that the use is reasonable considering other uses to which other riparian owners seek to put the lake. *Id.* at 136-137. The district court based its decision to uphold Amendment No. 1 on the size and shape of Crooked Lake, the relative ownership of the shoreline, and the fact that Amend-

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[4] In addition to attacking the validity of Amendment No. 1, both complaints also claimed that Amendment No. 1 effected an uncompensated taking of private property and sought just compensation as relief. The plaintiffs later dismissed those claims without prejudice. See Pet. 3.

[5] The court noted that "[t]he surface of Crooked Lake is property held in common by the Forest Service and private riparian landowners." Pet. App. 132.

ment No. 1 did not interfere with the natural state of Crooked Lake:

> In considering the watercourse and its size, character and natural state, I note that Crooked Lake is made up of bays, that the federal government owns 95% of the shoreline, and that the bay on which [petitioners'] property is located is not subject to the restrictions. I also note that the Forest Service restrictions do not interfere with the natural state of Crooked Lake but, instead, protect and preserve its natural state.

Id. at 138-139.

3. A unanimous panel of the court of appeals affirmed. Pet. App. 100-123. The panel first held that the Property Clause provides sufficient constitutional authority for the restrictions on private activity at issue in this case. Relying on decisions of this Court and other courts of appeals, the panel found it "clear that Congress may restrict actions on private property if they affect the government interest in protecting federal property." *Id.* at 109. The panel further held that "[t]here can be little question that Congress has the power to regulate Crooked Lake in the manner described by Amendment No. 1's management prescriptions," *ibid.*, and that Congress had permissibly authorized the Forest Service to do so, *id.* at 111-116.

The panel next addressed and rejected petitioners' contention that MWA § 5, by making the Forest Service's power over the Sylvania Wilderness "subject to valid existing rights," had stripped the agency of the authority to impose the restrictions at issue here. Pet. App. 116-122. The panel explained that

> the Forest Service possesses a power delegated to it by Congress that is "analogous to the police power," and its exercise of this federal power does not violate Congress's express limitation deferring to "existing" state law rights in the wilderness acts, so long as it does not exceed the bounds of permissible police power regulation under state law. The management prescriptions of Amendment No. 1 are clearly valid restrictions within the state law police power.

Id. at 119.

4. The court of appeals granted rehearing en banc and vacated the decision and judgment of the panel. Pet. App. 98-99. An equally divided en banc court subsequently issued an order affirming the judgment of the district court. *Id.* at 1-2. Judge Moore, joined by Chief Judge Merritt and Judge Daughtrey, filed an opinion concurring in the court's order. *Id.* at 2-8. In the view of the concurring judges, the MWA's requirement that the Forest Service administer the Sylvania Wilderness Area "subject to valid existing rights" serves (1) to prohibit the agency from taking private property, see *id.* at 3-4,[6] and (2) to impose upon the agency the same state-law restrictions that would constrain a local government in the exercise of the police power, *id.* at 6. The concurring judges referred to that standard as a "takings-plus" approach. See *id.* at 5, 6. Observing that "[petitioners'] riparian rights have never included the right to be immune from

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[6] The court observed that "Congress, of course, can always take property, provided it pays just compensation (and provided it does not violate due process), but Congress here has instructed the Forest Service not to do so." Pet. App. 4 (footnote omitted).

reasonable regulation," the concurring judges found it "clear * * * that Amendment No. 1 did not effect a taking or otherwise violate state-law limits on police power regulation," and they concluded on that basis that the judgment of the district court was "properly affirmed." *Id.* at 8.

Judge Boggs dissented, joined by Judges Norris, Suhrheinrich, and Batchelder. Pet. App. 9-97.[7] The dissenting judges acknowledged that "[d]espite [petitioners'] arguments, Congress undoubtedly has the constitutional power under the Property Clause to issue Amendment No. 1." *Id.* at 31. Those judges concluded, however, that Amendment No. 1 is inconsistent with MWA § 5 and is therefore beyond the scope of the Forest Service's authority. The dissenting judges found it "beyond cavil * * * that the phrase 'valid existing rights' refers to property rights, most of which are created by state law, protecting them from invasion or disparagement by the Forest Service." *Id.* at 43. The dissenting judges would have invalidated Amendment No. 1's ban on sailboats and houseboats on Crooked Lake. *Id.* at 50. They would have upheld the ban on nonburnable, disposable food containers, however, based on their conclusion that "[t]here are no cases holding that this is a 'valid' riparian 'right' under Michigan law." *Id.* at 50-51.

ARGUMENT

The opinion of the panel in this case has been vacated, see Pet. App. 98-99, and the judgment of the equally divided en banc court of appeals has no pre-

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[7] Seven members of the en banc court did not join either the concurring or the dissenting opinion.

cedential force. Cf. *Neil* v. *Biggers*, 409 U.S. 188, 192 (1972) (decision of equally divided Supreme Court is not "entitled to precedential weight"). Thus, none of the opinions issued in this case will have binding effect even within the Sixth Circuit. See Pet. App. 2 (concurring judges note that "after considerable expense of time and effort this case has resulted in no law of the circuit"). In any event, Amendment No. 1 does not contravene the directive in the Michigan Wilderness Act that the Forest Service administer the Sylvania Wilderness "[s]ubject to valid existing rights." Petitioners' other arguments also lack merit. Further review is not warranted.

1. In rejecting petitioners' contention that Amendment No. 1 is inconsistent with MWA § 5, the panel explained that the limitations on private activity imposed by the Forest Service would be permissible so long as those limitations "do[] not exceed the bounds of permissible police power regulation under state law." Pet. App. 119. The panel then concluded that "[t]he management prescriptions of Amendment No. 1 are clearly valid restrictions within the state law police power." *Ibid.* The concurring judges on the en banc court similarly read MWA § 5 to "impose[] the same restrictions on the Forest Service's exercise of federal police power that [state law imposes] on a local government's exercise of state police power." Pet. App. 6. Finding it "clear * * * that Amendment No. 1 did not effect a taking or otherwise violate state-law limits on police power regulation," the concurring judges concluded that the Forest Service's wilderness regulations are valid. *Id.* at 8.

That analysis reflects a recognition that "[petitioners'] riparian rights have never included the right

to be immune from reasonable regulation." Pet. App. 8. Petitioners cannot establish a "valid existing right" to engage in particular activities simply by demonstrating that those activities have not previously been restricted in the manner at issue here. Rather, they must show that state or local governmental officials would be *precluded* from imposing restrictions comparable to those adopted in Amendment No. 1. So long as the restrictions imposed by the Forest Service do not effect a taking, or extend beyond those that could validly be imposed by a state or local government in the exercise of its police power, petitioners simply have suffered no impairment of "valid existing rights."[8]

Petitioners fail to explain the basis for their disagreement with the foregoing analysis. Presumably petitioners believe either (1) that the re-

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[8] Thus, contrary to petitioners' contention, neither the panel nor the concurring judges on the en banc court suggested that the Forest Service "may ignore Michigan property law in defining 'valid existing rights.'" Pet. 24. To the contrary, both the panel and the concurring judges recognized that the extent of petitioners' "valid existing rights" under the MWA would depend substantially upon the scope of their property rights under Michigan law. See Pet. App. 118-121, 4-5. Those judges simply concluded that application of MWA § 5 should turn on whether the restrictions set forth in Amendment No. 1 *could permissibly* be imposed by state or local authorities, not whether comparable restrictions had in fact been imposed. See Pet. App. 119 (Amendment No. 1 is valid "so long as it does not exceed the bounds of permissible police power regulation under state law. The management prescriptions of Amendment No. 1 are clearly valid restrictions within the state law police power."); *id.* at 8 (finding it "clear * * * that Amendment No. 1 did not effect a taking or otherwise violate state-law limits on police power regulation").

strictions imposed by Amendment No. 1 exceed the authority of state and local governments under the police power, or (2) that the "valid existing rights" protected by MWA § 5 encompass uses of property that would be susceptible to regulation or prohibition by state and local authorities. Petitioners cite no authority, however, supporting either proposition.[9] Nor would either contention raise an issue of broad or recurring importance, particularly in light of the fact that the MWA applies only within a single State. Petitioners' argument that Amendment No. 1 is inconsistent with MWA § 5 therefore does not warrant this Court's review.

2. a. The Property Clause grants to Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. Petitioners contend (Pet. 13-14) that the authority of the federal government under the Property Clause does not extend to the regulation of private property interests. That contention is incorrect.

This Court has recognized for almost a century that Congress may regulate activity on private lands as a means of protecting public property. See *Camfield* v. *United States*, 167 U.S. 518 (1897); *United States* v. *Alford*, 274 U.S. 264, 267 (1927) ("Congress

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[9] Petitioners cite numerous cases (see Pet. 12) construing the phrase "valid existing rights." None of those cases involves the MWA, however, and there is no basis for petitioners' implicit assumption that the phrase must be given the same construction in every federal statute in which it appears. In any event, petitioners do not explain how the approach taken in any of the cited cases is inconsistent with the analysis of the panel or the concurring judges in the en banc court.

may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."). Although neither *Camfield* nor *Alford* expressly relied upon the Property Clause (see Pet. App. 106-107), this Court has subsequently explained that the "sole message" of *Camfield* "is that the power granted by the Property Clause is broad enough to reach beyond territorial limits." *Kleppe* v. *New Mexico*, 426 U.S. 529, 538 (1976). The courts of appeals have likewise held that Congress may enact statutes, and federal agencies may promulgate regulations, affecting nonfederal lands or property interests in order to protect federal lands. See, *e.g.*, *Duncan Energy Co.* v. *United States Forest Service*, 50 F.3d 584, 589 (8th Cir. 1995); *Free Enterprise Canoe Renters Ass'n* v. *Watt*, 711 F.2d 852, 855-856 (8th Cir. 1983); *United States* v. *Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979). Petitioners cite no contrary authority.[10]

b. As the dissenting judges on the en banc court recognized, congressional power is particularly clear in the instant case because "the riparian rights allegedly destroyed by Amendment No. 1 are shared by the federal government and [petitioners]. Thus, the federal government's regulation of its own property is inseparable from its regulation of [petitioners'] property." Pet. App. 23. Despite petitioners' characterization of Crooked Lake as "private property" (Pet. 16, 22), the federal government has a property interest in the surface of Crooked Lake of at least equal dignity to petitioners' interest, because

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[10] There is similarly no authority for petitioners' assertion (Pet. 15) that "before Congress may regulate private property through the Property Clause, those regulations must be indispensable to the protection of federal land."

the federal government is the riparian owner of 95% of the shoreline of the lake. Pet. App. 139; see also *id.* at 29 (dissenting judges conclude that the "contention that the lake is private property must be rejected").[11] As the dissenting judges observed, "[u]nless Congress is to be denied the power to regulate its own property, * * * regulations like Amendment No. 1 must be constitutional." *Id.* at 23; see also *id.* at 31 ("[d]espite [petitioners'] arguments, Congress undoubtedly has the constitutional power under the Property Clause to issue Amendment No. 1.").

c. Section 2(a) of the Wilderness Act provides for the management as wilderness of certain "federally owned lands." 16 U.S.C. 1131(a). Petitioners contend that the surface of Crooked Lake is not "federally owned," and that the Wilderness Act therefore forbids its management as wilderness. See Pet. 16-17. As the dissenting judges recognized (Pet. App. 23-24), that claim is without merit. Whether or not the surface of Crooked Lake (which is jointly owned by the federal government and private parties) is "federally owned" within the meaning of 16 U.S.C. 1131(a), the MWA provides express authorization for the management as wilderness of the portion of the lake that lies within the Sylvania Wilderness Area. Pet. App. 24.[12]

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[11] Indeed, elsewhere in their petition, petitioners acknowledge that the surface of Crooked Lake "is co-owned by numerous individuals, including the United States." Pet. 20.

[12] Section 7 of the MWA provides that "Congress does not intend that designation of wilderness areas in the State of Michigan lead to the creation of protective perimeters or buffer zones around each wilderness area." 101 Stat. 1277. Contrary to petitioner's contention (see Pet. 17), the portion of Crooked Lake subject to Amendment No. 1 is not a "buffer

d. Section 9 of the MWA provides that "no privately owned lands within any area designated by this Act may be acquired without concurrence of the owner of such lands." 101 Stat. 1277. Relying on that provision, petitioners contend that the Forest Service "has no authority to regulate, as wilderness, the private property that is Crooked Lake." Pet. 18. That is a non sequitur. At least so long as the restrictions imposed by Amendment No. 1 do not effect a taking of private property, the Forest Service cannot plausibly be said to have "acquired" any "privately owned lands" through the promulgation of the amendment. The petition does not contend that Amendment No. 1 effects a taking, and any such claim would be without merit. See Pet. App. 6-7 (Moore, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1996

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zone" that lies "adjacent to" a wilderness area: it is part of the Sylvania Wilderness Area. MWA § 7 therefore has no application to this case. See Pet. App. 30 (Boggs, J., dissenting).